Trans Resources Corp Sdn Bhd v Sanwell Corp & Anor (No 2)

HIGH COURT (KUALA LUMPUR) — CIVIL SUIT NO S2-22-42 OF 1998
KAMALANATHAN RATNAM J
19 MAY 1999

Arbitration *— Stay of proceedings — Application — Admission of debt by third party — Whether there was dispute between the parties — Whether disputed relief sought was within terms and scope of arbitration clause — Whether multiplicity of proceedings which may result in inconsistent findings of fact and decisions by different tribunals was ground for not staying proceedings — Whether entering of unconditional appearance was a step in the proceedings thus barring an application for a stay*

By an earthworks contract ('the earthworks contract'), the first defendant engaged the plaintiff to carry out earthworks upon the terms and conditions contained therein. Clause 41 of the earthworks contract contained a provision for the arbitration of dispute arising between the parties as to the construction of the contract or 'any matter or thing of whatsoever nature arising under the contract'. There were also other agreements between the parties, inter alia, a lease agreement to which the second defendant was a party. The other agreements did not contain the arbitration clause. The plaintiff brought an action against the first defendant for a sum allegedly owed by the first defendant to the plaintiff for earthworks performed under the earthworks contract. The first defendant applied for a stay of proceedings pursuant to s 6 of the Arbitration Act Act 1952. The plaintiff raised four issues as to why the matter ought not to be referred to arbitration, namely: (i) there was no dispute as the first defendant has acknowledged that there was a debt due to the plaintiff as shown in exh SMZ-7 which was the amount certified by the architect and exh SMZ-11 which amount was acknowledged as due by Agarta Universe Sdn Bhd ('Agarta') — a company belonging to the same group of companies as the first defendant; (ii) the disputed relief sought was not within the terms and scope of the arbitration clause; (iii) multiplicity of proceedings which may result in inconsistent findings of fact and decisions by different tribunals because the second defendant would not have recourse to the same arbitration proceedings; and (iv) by entering an unconditional appearance, the first defendant had taken a step in the proceedings thus barring an application for a stay.

Held, allowing the application:

(1) Exhibit SMZ-7 was merely an evaluation of the work done by the plaintiff. Nowhere was it stated that the first defendant was liable to the plaintiff for the amount certified. As for exh SMZ-11, the letter from Agarta constituting an admission of the debt by the first defendant was untenable in law as proof of the first defendant's liability to the plaintiff since Agarta was a separate

legal entity from the first defendant and was not a party to the earthworks contract. A third party could not make an admission on behalf of the first defendant (see p 615F–I).

(2) The dispute as to payment which was an obligation arising under the earthworks contract was a 'matter or thing arising' thereunder and thus was within the scope of cl 41 (see p 616D).

(3) The terms of each of the agreements would have been within the knowledge and/or contemplation of all the parties at the time of their execution. Therefore, because only the earthworks contract had expressly provided for an arbitration clause to the exclusion of the other agreements, a strong inference may be made that the intention of the parties was to refer to an arbitrator only disputes arising under the earthworks contract and not disputes arising under the other agreements. Thus, it was the plaintiff and the second defendant who, through their own default by not resorting to the procedural choice of seeking arbitration, had given rise to the issue of multiplicity of proceedings. The plaintiff and the second defendant could not now be seen to take advantage of their own default (see p 618B–G).

(4) The entry of a conditional appearance pursuant to O 12 rr 6 and 7 of the Rules of the High Court 1980 is only available to cases where the defendant complains of an irregularity or defect in the originating process or service of the process upon him and/or the defendant alleges that the court is without jurisdiction to deal with the dispute (see p 619H–I). The entering of an unconditional appearance could not amount to a waiver of the defendant's right to proceed to arbitration on the basis that the plaintiff's filing of the civil suit did not amount to either an irregularity or a defect in the writ or service thereof and in opposing the action it had not been the first defendant's contention that the court has no jurisdiction to deal with the dispute (see p 622C–D); *Usahabina v Anuar bin Yahya* [1998] MLJU 176 not followed.

[Bahasa Malaysia summary

Melalui satu kontrak kerja tanah ('kontrak kerja tanah tersebut'), defendan pertama telah mengambil plaintif untuk menjalankan kerja tanah menurut terma-terma dan syarat-syarat yang terkandung di dalamnya. Fasal 41 kontrak kerja tanah tersebut mengandungi peruntukan untuk menimbang tara pertikaian yang timbul antara pihak-pihak mengenai maksud kontrak atau 'apa-apa perkara atau urusan di dalam apa-apa bentuk yang timbul di bawah kontrak'. Terdapat juga perjanjian-perjanjian lain antara pihak-pihak, antara lain, satu perjanjian pajakan di mana defendan kedua adalah salah satu pihaknya. Perjanjian yang lain tidak mengandungi fasal timbang tara. Plaintif telah membawa tindakan terhadap defendan pertama untuk suatu jumlah yang dikatakan dihutang oleh defendan pertama kepada plaintif untuk kerja tanah yang dilaksanakan di bawak kontrak kerja tanah tersebut. Defendan pertama telah memohon untuk

menggantungkan prosiding menurut s 6 Akta Timabang Tara 1952. Plaintif telah menimbulkan empat isu mengapa perkara tersebut tidak patut dirujuk kepada penimbang tara, iaitu: (i) tidak terdapat apa-apa pertikaian kerana defendan pertama telah mengakui bahawa terdapat hutang kepada plaintif yang belum dijelaskan seperti yang ditunjukkan dalam eksh SMZ-7 yang merupakan jumlah yang disahkan oleh arkitek dan eksh SMZ-11 yang mana jumlahnya diakui masih belum dijelaskan oleh Agarta Universe Sdn Bhd ('Agarta') —sebuah syarikat yang dimiliki oleh kumpulan syarikat-syarikat yang sama dengan defendan pertama; (ii) relif yang dipertikaikan dan dipohon bukan di dalam terma dan skop fasal timbang tara; (iii) prosiding yang pelbagai yang mungkin mengakibatkan keputusan yang tidak konsisten dengan penemuan fakta dan keputusan-keputusan oleh tribunal-tribunal yang berbeza kerana defendan kedua tidak dapat merujuk kepada prosiding timbang tara yang sama; dan (iv) dengan memasuki kehadiran bersyarat, defendan pertama telah mengambil langkah dalam prosiding dan dengan itu telah menghalang permohonan untuk penangguhan.

Diputuskan, membenarkan permohonan:

(1) Ekshibit SMZ–7 hanyalah merupakan penilaian bagi kerja-kerja yang telah dilakukan oleh plaintif. Tidak tercatat di mana-mana pun bahawa defendan pertama adalah bertanggungan kepada defendan untuk jumlah yang disahkan. Bagi ekshibit SMZ-11 pula, surat daripada Agarta yang terjumlah kepada pengakuan hutang tersebut oleh defendan pertama tidak boleh dipertahankan dari segi undang-undang sebagai bukti liabiliti defendan pertama kepada plaintif kerana Agarta adalah entiti undang-undang yang berbeza daripada defendan pertama dan bukan pihak kepada kontrak kerja tanah tersebut. Seorang pihak ketiga tidak boleh membuat pengakuan bagi pihak defendan pertama (lihat ms 615G–I).

(2) Pertikaian mengenai pembayaran yang merupakan tanggungjawab yang timbul di bawah kontrak kerja tanah tersebut adalah 'perkara atau urusan yang timbul' di bawahnya dan oleh itu adalah di dalam skop fasal 41 (lihat ms 616D).

(3) Terma setiap perjanjian adalah di dalam pengetahuan dan/atau fikiran kesemua pihak-pihak pada masa pelaksanaannya. Oleh itu, oleh kerana hanya kontrak kerja tanah tersebut telah memperuntukkan secara nyata untuk suatu fasal timbang tara dengan mengecualikan perjanjian-perjanjian lain, suatu inferens yang kukuh mungkin boleh dibuat bahawa niat pihak-pihak hanyalah untuk merujuk kepada seorang timbang tara pertikaian yang timbul di bawah kontrak kerja tanah tersebut dan bukannya pertikaian daripada perjanjian yang lain. Oleh itu, plaintif dan defendan kedua, atas keingkaran mereka sendiri, telah tidak memilih prosedur untuk merujuk kepada penimbang tara. Plaintif dan defendan kedua tidak boleh kini dilihat mengambil kesempatan atas keingkaran mereka sendiri (lihat ms 618B–G).

(4) Kemasukan satu kehadiran bersyarat menurut A 12 kk 6 dan 7 Kaedah-Kaedah Mahkamah Tinggi 1980 hanyalah terbuka untuk kes-kes di mana defendan mengadu mengenai luar aturan atau kecacatan di dalam proses pemula atau proses penyampaian kepadanya dan/atau defendan mengatakan bahawa mahkamah tidak mempunyai bidang kuasa untuk mendengar pertikaian tersebut (lihat ms 619H–I). Kemasukan kehadiran tidak bersyarat tidak terjumlah kepada penepian hak defendan untuk merujuk kepada timbang tara atas dasar bahawa pemfailan tindakan sivil defendan tidak terjumlah kepada luar aturan atau kecatatan di dalam writ atau penyampaian dan dalam menentang permohonan tersebut ia tidak ditegaskan oleh defendan bahawa mahkamah tidak mempunyai bidang kuasa untuk mendengar pertikaian tersebut (lihat ms 622C–D); *Usahabina v Anuar bin Yahya* [1998] MLJU 176 tidak diikut.]

Notes

For cases on stay of proceedings, see 1 *Mallal's Digest* (4th Ed, 1998 Reissue) paras 1014–1052.

Cases referred to

Alagappa Chettiar v Palanivelpillai & Ors [1967] 1 MLJ 208 (refd)
Avro International, The; 'Avro Venture'; 'Avro International (Owners of) v Arabian Marine Bunkers Sales Co Ltd & Anor [1988] 1 MLJ 147 (refd)
Bulk Oil (Zug) A-G v Trans-Asiatic Oil Ltd SA [1973] 1 Lloyd's Rep 129 (refd)
Cheah Wai Poh v Chin Brothers & Co Ltd [1958] MLJ 215 (refd)
Elf Petroleum SE Asia Pte Ltd v Winelf Petroleum Sdn Bhd [1986] 1 MLJ 177 (refd)
Fakes v Taylor Woodrow Construction Ltd [1973] 1 All ER 670 (refd)
Ismail bin Abd Halid & Ors v National Union of Newspapers Workers [1993] 3 MLJ 541 (refd)
Hashim bin Majid v Param Cumaraswamy & Ors [1993] 2 MLJ 20 (refd)
Jade, Re The [1976] 1 All ER 441 (refd)
KSM Insuran Bhd v Ong Ah Ba & Anor [1986] 1 MLJ 237 (refd)
Lee Brothers Construction Co v Teh Teng Seng Realty Sdn Bhd [1988] 1 MLJ 459 (refd)
Malayan Banking Bhd & Anor v Swasta Jaya Sdn Bhd [1990] 2 MLJ 12 (refd)
Pine Hill, Re [1958] 2 Lloyd's Rep 146 (refd)
San Kong Letrik Sdn Bhd v Lembaga Letrik Negara Tanah Melayu & Anor [1992] 1 CLJ 190 (refd)
Seloga Jaya Sdn Bhd v Pembenaan Keng Ting (Sabah) Sdn Bhd [1994] 2 MLJ 1997 (refd)
Sheldon v Brown Bayley's Steelworks Ltd & Anor [1953] 2 All ER 894 (refd)

Smith v Pearl Assurance Co Ltd [1939] 1 All ER 95 (refd)
Tan Kok Cheng & Sons Realty Co Sdn Bhd v Lim Ah Pat (t/a Juta Bena) [1995] 3 MLJ 273 (refd)
Taunton Collins v Cromie & Anor [1964] 2 All ER 332 (refd)
Usahabina v Anuar bin Yayha [1998] MLJU 176 (not folld)

Legislation referred to

Arbitration Act 1952 s 6
English Arbitration Act 1950 s 4(1)
Rules of the High Court 1980 O 12 rr 6, 7

CC Choo (*SK Lit* with him) (*CC Choo & Co*) for the plaintiff.
HL Ooi (*HK Yeoh* with him) (*Cheang & Ariff*) for the first defendant.
Logan B Sabapathy (*TJ Chin* with him) (*Logan Sabapathy & Co*) for the second defendant.

Cur Adv Vult

Kamalanathan Ratnam J:

Facts

By an earthworks contract dated 30 October 1996 between the first defendant and the plaintiff ('the earthworks contract'), the first defendant engaged the plaintiff to carry out earthworks upon the terms and conditions contained therein. Clause 41 of the earthworks contract contains a provision for the arbitration of disputes and/or differences arising between the parties to the contract. The said clause reads as follows:

> ... If the parties do not reach such amicable solution within 14 days from the request sent by any party to the other party to start the above negotiations, then the disputes shall be finally settled by arbitration, pursuant to s 41 below.
>
> Arbitration
>
> (a) If any dispute or difference shall arise between the client and the earthworks contractor, either during the progress or after completion of the works, or after the termination of the earthworks contractor's employment, or breach of this contract, as to:
>
> (i) the construction of this contract, or
>
> (ii) any matter or thing of whatsoever nature arising under this contract, then such dispute or difference shall be referred to the Regional Centre for Arbitration at Kuala Lumpur ('the arbitrator') for a decision. ...

Plaintiff's claim

By way of this suit, the plaintiff claims against the first defendant the sum of RM17,459,445.69 allegedly owed by the first defendant to the plaintiff for earthworks performed under the said earthworks contract.

The first defendant's case

The first defendant disputes the plaintiff's claim on two grounds, namely:

(i) that on a true and proper construction of the earthworks contract and in all the circumstances of the case, the plaintiff is not entitled to seek payment of the sum of RM15,500,000 from the first defendant upon termination of the earthworks contract; and

(ii) that on a true and proper construction of the earthworks contract and in the light of all the facts and circumstances of the case, the first defendant is also not liable to the plaintiff for the balance of RM1,959,445.69 for want of approval by the first defendant for the works purportedly done amounting to this value.

The application

This is the first defendant's application for a stay of these proceedings pursuant to s 6 of the Arbitration Act 1952 ('the Act'). The said section reads as follows:

> If any party to an arbitration agreement or any person claiming through or under him commences any legal proceedings against any other party to the arbitration, or any person claiming through or under him, in respect of any matter agreed to be referred to arbitration, any party to the legal proceedings may, before taking any other steps in the proceedings, apply to the court to stay the proceedings, and the court, if satisfied that there is no sufficient reason why the matter should not be referred in accordance with the arbitration agreement, and that the applicant was at the time when the proceedings were commenced and still remains ready and willing to do all things necessary to the proper conduct of the arbitration, may make an order staying the proceedings.

Findings of the court

A study of s 6 of the Act shows that there are four requirements to be satisfied before a stay could be granted. The said four requirements are:

(a) that legal proceedings must have been commenced against the applicant in respect of a matter which has been agreed should be referred to arbitration;

(b) that no other steps in the proceedings be taken before the making of the application for stay;

(c) that there is no sufficient reason why the matter ought not to be referred to arbitration as agreed between the parties; and

(d) that the applicant was at the time of the application, and remains ready and willing to do all things necessary for the proper conduct of the arbitration.

Whilst requirements (a), (b) and (d) fall within the duty of the party applying for the stay to satisfy the court, it would seem that based on the decision of the court in *Lee Brothers Construction Co v Teh Teng Seng Realty Sdn Bhd* [1988] 1 MLJ 459, the onus is upon the party opposing the

application for a stay to show why the matter ought not to be referred to arbitration. This is what his Lordship Peh Swee Chin J (as he then was) said at p 460:

> It would be necessary to restate a few relevant basic principles of stay of action on ground of arbitration. Not only should there by a valid arbitration agreement, the applicant should apply for a stay before taking any step in the proceedings after appearance, and that applicant must satisfy the court that he was, at the time when proceedings were commenced, and still remains, ready and willing to do all things necessary for the proper conduct of the arbitration. See s 6 of the Arbitration Act 1952. These few principles require elaboration later with regard to the negative requirement of not taking any other step in the proceedings after appearance.
>
> In the face of such an application from a defendant, the plaintiff will have the onus of showing that the matter ought not to be referred to arbitration. See the old case of *Drouth v The Ship, 'Paul Donmer'* [1934] MLJ 72, and if the plaintiff fails to discharge that onus, the court will assume there is no sufficient ground for not granting a stay. In exercising its discretion, it is the prima facie duty of the court to act upon such an arbitration agreement: per Lord Selbourne LC in *Willesford v Watson* (1873) 8 Ch App 473 at p 480.

Having read the affidavits in respect of this application, I am satisfied that cl 41 of the earthworks contract which clause clearly is framed in wide and general terms envisages the nature of the two disputes raised by the first defendant.

The plaintiff raises four issues:

(1) There is no dispute as the first defendant has acknowledged that there is a debt due and owing by the first defendant to the plaintiff

In support of this issue, the plaintiff referred me to encl 6 (affidavit in support of the plaintiff's case) and to exh SMZ-7 which is the amount certified by the architect under the architect's certificate dated 7 August 1997. There was also reference made to exh SMZ-11 which amount was acknowledged as due by Agarta Universe Sdn Bhd ('Agarta'). It was pointed out that the first defendant and Agarta belonged to the same group of companies in that the former was appointed by the latter to enter into the earthworks contract. I have studied both exhibits. Exhibit SMZ-7, the architect's certificate dated 7 August 1997, is merely an evaluation of the work done by the plaintiff on the said site. Nowhere is it stated in the said letter that the first defendant is liable to the plaintiff for the amount certified. In any case, pursuant to cl 31.2 of the earthworks contract, in the event of termination of the contract by the plaintiff, the plaintiff is to require the second defendant and not the first defendant to pay the amount so certified.

As for the next exhibit, namely SMZ-11, which purportedly acknowledges the debt due from the first defendant to the plaintiff, it is my judgment that the letter from Agarta constituting an admission of the debt by the first defendant is untenable in law as proof of the first defendant's liability to the plaintiff since clearly Agarta is a separate legal entity from the first defendant and is not even a party to the earthworks contract. Surely, a third party cannot make an admission on behalf of the first defendant. In

any case, the affidavits filed by and on behalf of the first defendant in support of this application deny and dispute the allegation that the first defendant is liable for any sums to the plaintiff. The plaintiff relied on *Elf Petroleum SE Asia Pte Ltd v Winelf Petroleum Sdn Bhd* [1986] 1 MLJ 177 and on *KSM Insuran Bhd v Ong Ah Ba & Anor* [1986] 1 MLJ 237 to support its argument that where the amount is admitted, reference to arbitration does not arise. I am of the view that the two cases cited do not assist the plaintiff's case. In the *Elf Petroleum*, the learned judge based his decision on his finding that there was in fact an admission of debt and that the debt was not disputed in any of the affidavits. Similarly, in *KSM Insuran Bhd*, the court found the debt to be undisputed as the defendant therein had not contended that the amount claimed was not owing.

(2) That the disputed relief sought is not within the terms and scope of the arbitration clause

It is the plaintiff's case that as the dispute involves the construction of the letter of guarantee, which does not itself contain the arbitration clause, therefore the dispute is outside the scope of cl 41 of the earthworks contract. On the other hand, the first defendant submits that the dispute herein is clearly within the scope of the said clause. It is a fact that cl 41 covers:

> any dispute or difference ... between the client and the earthworks contractor ... as to:
>
> (i) the construction of this contract; or
>
> (ii) any matter or thing of whatsoever nature arising under this contract ... .

The first defendant argues that its case falls within limb (1) of cl 41 as it involves inter alia the construction of cll 31.2, 1.1.57, 2.2, and 2.5 of the earthworks contract. It is relevant to reproduce the said clauses.

Clause 31.2:

> ... In the event of termination under this s 31, the earthworks contractor is entitled to stop the carrying out of the earthworks works and request UML to pay the amount of money due for the performance of the earthworks works until the date of termination, ...

Clause 1.1.57:

> 'letter of guarantee' means the letter of guarantee, attached as Schedule 2 hereto, stating that UML represents, warrants and undertakes to pay the amount of RM15,500,000 (fifteen million five hundred thousand) as the guaranteed sum in lieu of the client in case of termination.

Clause 2.2:

> ... the parties agree and the earthworks contractor acknowledges that the earthworks contract sum is comprised of:
>
> (a) the guaranteed sum, the payment of which is guaranteed and secured by the letter of guarantee; and
>
> (b) the balance of earthworks contract sum which will be paid only in case the client grants its approval pursuant to s 2.5 hereof.

Clause 2.5:

> It is agreed by the parties that the earthworks contractor shall request to the client approval for the performance of any and all works which cause the payment of any amount of money exceeding the guaranteed sum.
>
> (a) If the client, upon request of the earthworks contractor, grants its approval in connection with the performance of such portion of the earthworks works, the value of which is in excess of the guaranteed sum, it shall secure the payment of the balance of the earthworks contract sum to the earthworks contractor.
>
> (b) If the client refuses to give such approval and/or give such guarantee in a form acceptable to the earthworks contractor, the earthworks contractor shall: (i) stop the performance of the earthworks works; and (ii) this earthworks agreement shall be terminated.

Considering the first defendant's contention that it is not liable for the balance sum for want of approval, it is clear to me from reading the above clauses that the first defendant's approval is indeed required for work done beyond the value of the guaranteed sum, that is, the balance sum or any part thereof. I find as a fact that the plaintiff has not stated in any of its affidavits let alone in its submission, that such an approval was ever obtained.

In any case it is also my judgment that the dispute as to payment, which is an obligation arising under the earthworks contract, is a 'matter or thing arising' thereunder.

(3) Multiplicity of proceedings

The plaintiff and the second defendant argued that if this application is allowed then there would be multiplicity of proceedings which may result in inconsistent findings of fact and decisions by different tribunals because the second defendant would have no recourse to the same arbitration proceedings. I cannot accept this argument. It is apparent that the intention of the parties was not to submit all the issues arising, save for disputes under the earthworks contract, to arbitration. I am of the view that this court ought to give effect to what was expressly agreed to between the parties and refer the dispute covered by cl 41 of the earthworks contract to arbitration. The case of *Bulk Oil (Zug) A-G v Trans-Asiatic Oil Ltd SA* [1973] 1 Lloyd's Rep 129 has similar connotations. This case involved two closely linked agreements, namely, a contract for carriage by sea which contained an arbitration clause and a charter party contract which did not contain such a clause. Both agreements were 'linked in conception, execution and breach'. The plaintiff in this case sought to obtain a stay of the defendant's counterclaim pending reference to arbitration pursuant to s 4(1) of the English Arbitration Act 1950 which is in pari materia with our s 6 of the Act. In *Bulk Oil* despite the issue of multiplicity of proceedings raised by the defendant Kerr J held that the express procedural choice of the parties ought to be enforced and granted a stay in respect of the dispute governed by the arbitration clause. He said at p 138:

> The fact that, despite the close relationship between these agreements, the parties have deliberately made them subject to different jurisdiction clauses is a point which must weigh heavily in the balance against the defendants, who

now seek to invoke this close relationship between the agreements as a ground for obliterating this difference to which they have agreed. A

Coming to the case before me, it is obvious from an examination of the lease agreement, the joint venture agreement, the earthworks contract, the letter of guarantee, that these agreements were and are all very closely related or linked to one another. In any case, the second defendant has indeed acknowledged this as a fact. B

In the circumstances, it is my judgment that the terms of each of the agreements would have been within the knowledge and/or contemplation of all the parties at the time of their execution. I therefore find that because only the earthworks contract has expressly provided for an arbitration clause to the exclusion of the other aforesaid agreements, a strong inference may be made that the intention of the parties was to refer to an arbitrator only disputes arising under the earthworks contract, and not disputes arising under the other agreements. C

I am therefore bound to give recognisance to the freedom of the parties to contract in whatsoever manner by giving effect to the clear intention of the parties as contained in the earthworks contract. Therefore since the various parties to the agreements including the plaintiff and the second defendant intended to exclude any recourse to arbitration in the agreements, with the exception of the earthworks contract, it is only just and fair that the parties be kept to the express terms of their respective agreements and that this court ought to exercise its discretion by enforcing the arbitration clause in cl 41 of the earthworks contract. D E

It is not in dispute that the second defendant is a party to the lease agreement and the letter of guarantee and possesses full knowledge of the joint venture agreement through its subsidiary, UM Leisure Sdn Bhd. The plaintiff is a party to both the earthworks contract and the letter of guarantee. As such, the second defendant and the plaintiff could have expressly provided for arbitration in the event of a dispute in respect of the other agreements. Since they had not done so (except for the earthworks contract), I find that it is the plaintiff and the second defendant who, through their own default by not resorting to the procedural choice of seeking arbitration, have given rise to the issue of multiplicity of proceedings. The plaintiff and the second defendant cannot now be seen to take advantage of their own default. One of the cases relied on by the plaintiff is *Alagappa Chettiar v Palanivelpillai & Ors* [1967] 1 MLJ 208. In that case the learned judge held that the party opposing the stay application had discharged the onus of satisfying the court that there were good grounds for the case to proceed to court as some of the issues in dispute were within the exclusive jurisdiction of the Rent Assessment Board, which necessarily meant that an arbitrator would have no jurisdiction to deal with the same. In the case before me, neither the plaintiff nor the second defendant has contended that the dispute herein is outside the jurisdiction of the arbitrator. It is my judgment that if the parties had expressly provided for arbitration to be incorporated in all the agreements, which they could have easily done, then an arbitrator could have dealt with all the issues arising herein without any question as to jurisdiction. F G H I

(4) Step in the proceedings by filing an unconditional appearance

The plaintiff submits that by entering an unconditional appearance the first defendant has taken a step in the proceedings. The plaintiff relied heavily upon the decision of *Usahabina v Anuar bin Yayha* [1998] MLJU 176 where Augustine Paul JC (as he then was) held that the entry of an unconditional appearance did amount to a step in the proceedings, thus barring an application for stay. His Lordship arrived at this decision based on two primary grounds, namely:

(i) The absence of the words 'after appearance' in the phrase 'before taking any other steps in the proceedings' in s 6. This is in contradistinction with the English equivalent to s 6 which provision reads '... any party to those legal proceedings may at any time after appearance, and before delivering any pleading or taking any other steps in the proceedings ...'.

(ii) That the entry of an unconditional appearance was submission to the jurisdiction of the court and hence a waiver of the defendant's right to resort to arbitration.

With very great respect to my learned brother, I decline to adopt his reasoning. The order relating to conditional appearance is governed by O 12 rr 6 and 7 of the Rules of the High Court 1980 ('the RHC') which reads as follows:

6 Conditional appearance

(1) A defendant to an action may with the leave of the court enter a conditional appearance in Form 16 in the action.

(2) A conditional appearance, except by a person sued as a partner of a firm in the name of that firm and served as a partner, is to be treated for all purposes as an unconditional appearance unless the court otherwise orders or the defendant applies to the court, within the time limited for the purpose, for an order under rule 7 and the court makes an order thereunder.

7 Application to set aside writ, etc

(1) A defendant to an action may at any time before entering an appearance therein, or, if he has entered a conditional appearance, within 14 days after entering the appearance, apply to the court for an order setting aside the writ or service of the writ, or notice of the writ on him or declaring that the writ or notice has not been duly served on him or discharging any order giving leave to serve the notice on him out of the jurisdiction.

(2) An application under this rule must be made by summons.

The entry of a conditional appearance pursuant to O 12 rr 6 and 7 of the RHC is in my view only available to cases where:

(a) the defendant complains of an irregularity or defect in the originating process or service of the originating process upon him; and/or

(b) the defendant alleges that the court is without jurisdiction to deal with the dispute.

Augustine Paul JC (as he then was) followed the Singapore Court of Appeal's decision in *The 'Avro International'* [1988] 1 MLJ 147 (CA) which upheld the trial judge's decision (see *The Avro Venture* [1987] 1 MLJ 16). In that case the court held that a defendant who wishes to set aside the writ or its service for non-appearance of the rules of procedure or who wishes to challenge the jurisdiction of the court must therefore enter a conditional appearance and since in that case the appellant had entered an unconditional appearance that was fatal to its right to object to jurisdiction.

In my view neither of the two criteria relied upon by Augustine Paul JC are applicable to a s 6 application since the court's jurisdiction can never be contractually ousted by parties to a contract. This reasoning is solidly propounded by Gopal Sri Ram JCA in the Federal court decision in *Tan Kok Cheng & Sons Realty Co Sdn Bhd v Lim Ah Pat (t/a Juta Bena)* [1995] 3 MLJ 273 where his Lordship said at pp 278–279 as follows:

> At common law, a prior agreement between contracting parties to refer their disputes to arbitration did not operate to bar either of them from instituting proceedings in the ordinary courts. Neither did such a clause preclude the court from entertaining a suit filed in breach of the contract to arbitrate. However, the court could, in the exercise of its discretion, stay an action and require a plaintiff to adhere to the obligation voluntarily undertaken to go to arbitration. The judicial philosophy behind this approach is based upon sound principle. It is this. Since consent cannot confer jurisdiction upon a court which has none, there can be no consensual ousting of a court's jurisdiction to hear and determine disputes between litigants. See *Inter Maritime Management Sdn Bhd v Kai Tai Timber Co Ltd, Hongkong* [1995] 1 MLJ 322.

In *Cheah Wai Poh v Chin Brothers & Co Ltd* [1958] MLJ 215, Syed Sheh Barakbah J (as he then was) held that the entry of unconditional appearance is not 'taking any other steps in the proceedings' within the meaning of s 5(1) of the Arbitration Ordinance. 'Steps in the proceedings', in the technical sense, means an application to the court such as taking out a summons; the act must display intention to proceed with the suit and to give up the right to have the matter disposed of by arbitration. Again in *Hashim bin Majid v Param Cumaraswamy & Ors* [1993] 2 MLJ 20, Anuar J (as he then was) said at p 24 as follows:

> The learned counsel for the plaintiff submitted that the defendants have entered an unconditional appearance and therefore no longer have a right to apply to the court to stay the proceedings.
>
> The learned counsel argued that by entering an appearance, the defendants have taken a step in the proceedings. Under s 6 of the Arbitration Act 1952, the defendants may only apply to the court to stay the proceedings 'before taking any other steps in the proceedings'.
>
> The pertinent question here is what is a 'step'. In *Ives & Barker v Willans* [1894] 2 Ch 478, Lindley LJ said at p 484:
>
> > 'The authorities shew that a step in the proceedings means something in the nature of an application to the court, and not mere talk between solicitors or solicitors' clerks, nor the writing of letters, but the taking of some step, such as taking out a summons or something of that kind, which is, in the technical sense, a step in the proceedings.'

A It is clear to me that entering an appearance is not or cannot be regarded as a step in the proceedings.

In my view the defendants may apply to the court for stay of proceedings under s 6 of the Arbitration Act 1952.

In *Usahabina*, my learned brother having considered the decisions in *Cheah* B *Wai Poh* and *Hashim bin Majid* declined to follow the same.

In the circumstances, based on the rationale in *Tan Kok Cheng* there can be no question of the parties consensually ousting the court's jurisdiction to hear and determine disputes between them.

Additionally the fact that an affidavit was filed in response to the C plaintiff's application for summary judgment also presents no bar as the said affidavit was filed subject to a reservation of the right to arbitrate. On this issue it is pertinent to refer to the case of *Ismail bin Abd Halid & Ors v National Union of Newspapers Workers* [1993] 3 MLJ 541 where Mahadev Shankar J (as he then was) said at p 551:

D Counsel for the Union sought to submit that no affidavit was filed to controvert the fact stated by the plaintiffs because that would be tantamount to taking 'a step in the action' which would have defeated the application for a stay.

With respect, I regret I am unable to agree. The onus cast by s 6 of the Arbitration Act 1972 to show sufficient reason why the matter had to be E referred to arbitration was upon the Union. Where the circumstances were such that it was not enough to make a bald reference to the existence of the arbitration clause, it was for the party insisting on the arbitration to show why that should be so. Arbitration is but a means to an end. Whether the parties should be compelled to take that route to resolve the dispute or whether it should be done by the court is a problem which may require consideration of a variety of other facts. Provided the party applying for a stay makes it clear F *before* he joins issue on the merits, that he is doing so without prejudice to and subject to his insistence on the arbitration clause, that should not amount to a step in the action.

In *Usahabina*, the court considered the case of *Sheldon v Brown Bayley's Steelworks Ltd & Anor* [1953] 2 All ER 894, which involved the service of a G writ more than 12 months after it was issued, that is, an irregular writ. It was held there that entering an unconditional appearance was a waiver of such irregularity. In the present case, there is no question of an irregularity by the plaintiff's filing of the action herein which may be waived. The first defendant merely asked the court to exercise its discretion under s 6 of the Act which statutory provision provides recourse to parties to enforce express H arbitration agreements. The first defendant has at all material times conceded that this court has full jurisdiction to deal with and decide on all the issues arising herein and has at no time challenged the jurisdiction of the court. Another decision followed by the learned judge in *Usahabina* is the case of *Malayan Banking Bhd & Anor v Swasta Jaya Sdn Bhd* [1990] 2 MLJ 12. In that case due to a mistake by the court registry the appearance was I not entered into the court file and judgment in default was thereby entered. The judgment in default was then set aside on grounds of irregularity. The case only emphasizes the significance and the importance of filing an

appearance and does not in any way support the contention that filing an unconditional appearance is tantamount to taking steps in the proceedings. Finally I refer to the then Supreme court decision in *Seloga Jaya Sdn Bhd v Pembenaan Keng Ting (Sabah) Sdn Bhd* [1994] 2 MLJ 1997 (SC) where the court held that the filing of affidavits seeking discharge of the ex parte interlocutory injunction and the taking of the preliminary objection challenging the jurisdiction of the court did not indicate an election to abandon the defendant's right to a stay and did not constitute the taking of a step in the proceedings, notwithstanding the fact that in *Seloga Jaya* the defendant had indeed entered a conditional appearance and applied for a stay.

To my mind, the entering of an unconditional appearance cannot amount to a waiver of the defendant's right to proceed to arbitration on the basis that the plaintiff's filing of the civil suit herein does not amount to either an irregularity or a defect in the writ or service thereof and in opposing the action it has not been the first defendant's contention that the court has no jurisdiction to deal with the dispute.

(5) Financial hardship, justice and convenience

On this issue, the plaintiff contends that its claim is for a large sum and that no payment has been made by the first defendant to the plaintiff for a considerable period of time. It also raises the issue of substantial arbitration fees and the fact that such fees would have to be paid up-front.

I find that these arguments do not constitute good grounds for refusing a stay. The time and mode of payment for the earthworks and the provisions relating to arbitration in the event of a dispute are all governed by express terms based on the earthworks contract. These terms were agreed upon between the plaintiff and the first defendant. The plaintiff cannot now be heard to complain of injustice and ask this court to intervene and revoke such clear and unequivocal terms in the earthworks contract willingly entered into by the parties, just because some terms have become inconvenient or disadvantageous to the plaintiff. Excessive costs of arbitration ought to have been in the plaintiff's mind even when it had entered into the earthworks contract. Courts will be loathe to disrupt agreements and contracts willingly entered into by parties where the terms and conditions are clear, expressive and unequivocal. There is in any case no evidence before me that litigation in court would be any cheaper. The plaintiff also raised the issue that the first defendant has ceased business operations in Malaysia. Other than this bare statement nothing more has been made of it by the plaintiff. Relying upon the case of *Fakes v Taylor Woodrow Construction Ltd* [1973] 1 All ER 670, the plaintiff urged this court to consider the financial hardship faced by the plaintiff in order to proceed to arbitration. I have read *Fakes* case. There the court started by citing the general principle as laid down by the court of Appeal in *Smith v Pearl Assurance Co Ltd* [1939] 1 All ER 95 where Sir Gordon Willmer said at p 677 in *Fakes* case as follows:

> ... I think we must start from the principles laid down by this court in *Smith v Pearl Assurance Co Ltd.* I take that decision to be a decision of principle as to

A what may and what may not properly be taken into consideration by a court exercising its discretion whether or not to stay proceedings where there is an arbitration clause. It was held in that case that the mere fact of the plaintiff's poverty, which would have rendered it financially impossible for him to go to arbitration, was not per se a sufficient ground on which the court could refuse to order a stay.

B It is clear that a departure from such established general principle in the *Fakes* case was restricted only to the limited circumstances therein, where the plaintiff was an insolvent individual on legal aid. Lord Denning MR held that as legal aid would not be available for arbitration proceedings referring the case to arbitration would be tantamount to depriving the C plaintiff to a claim. In the case before me, there is no question of legal aid. The plaintiff has adduced no evidence of insolvency or impecuniosity. This argument is therefore rejected.

Ready and willing

D The first defendant has averred that it is willing to do all things necessary for the purpose of the arbitration. In *Lee Brothers Construction Co*, Peh Swee Chin J said as follows at p 461:

> It was fourthly submitted that a bald assertion about willingness to do everything necessary for the proper conduct of the arbitration was not sufficient.
>
> E Jessel MR in *Piercy v Young* (1880) 14 Ch D 200 made an observation, though *obiter*, that the lower court should have required an affidavit to be produced on willingness and readiness to refer to arbitration. In my view, an affidavit ought to be ordinarily sufficient as to such willingness or readiness in the absence of some evidence of unwillingness on the part of the defendant to refer to such tribunal of its choice.

F In the case before me no other evidence has been adduced to show that the first defendant is unwilling to arbitrate.

The second defendant raises two issues:

(1) Multiplicity of proceedings

G In effect the second defendant's arguments are almost similar to those raised by the plaintiff. The plaintiff relied on *The Pine Hill* [1958] 2 Lloyd's Rep 146 and *Taunton Collins v Cromie & Anor* [1964] 2 All ER 332 to support its argument on multiplicity of proceedings. However these two cases were considered by Kerr J in *Bulk Oil* and which I had adverted to H earlier. In distinguishing *The Pine Hill* and *Taunton Collins* with the facts in *Bulk Oil* Kerr J said at p 136:

> ... in both these cases the multiplicity of proceedings covering the same issues did not arise solely from a choice made by the party wishing the whole dispute to be dealt with by litigation. In the first case the difficulty was due to the party which was applying for the stay, i.e., the charterers. In the second case the I difficulty was due to a defence raised by a party which was not concerned with any arbitration clause, ie the architect seeking to blame the contractors. In neither case was the difficulty in which the plaintiff found himself due to his own procedural choice.

The second defendant also referred me to *The Jade* [1976] 1 All ER 441 and *San Kong Letrik Sdn Bhd v Lembaga Letrik Negara Tanah Melayu & Anor* [1992] 1 CLJ 190. Again these cases may be well distinguished. The multiplicity of proceedings in these cases arose from claims in tort and not as a result of a conscious choice made by the parties. These cases involved contractual claims containing arbitration clauses, and claims in tort. The case before me involves purely contractual relations under which the parties could have provided for the incorporation of the arbitration clause, but chose not to do so, save and except in the case of the earthworks contract.

(2) To consider the letter of guarantee

I have sufficiently canvassed this issue in dealing with the case as against the first defendant. I need not repeat my views. The same would apply in respect of the second defendant.

I therefore grant an order in terms of the first defendant's application with costs.

Order accordingly.

Reported by Jafisah Jaafar